

CWA § 404(g): State and Tribal Dredged and Fill Permit Program Regulatory Revision

EPA Region 6 Tribal Operations Committee (RTOC)

November 28, 2018

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Agenda

- Presentation on CWA 404(g) Program and Proposed Rulemaking Revision, Kathy Hurl, OWOW
 - Background
 - Revising CWA 404(g) Regulations
 - Issues for Input
- Q&A - *Tribal Participants discussion* Potential issues for input:
 - Scope of assumable waters
 - Partial assumption
 - Costs and additional challenges
- Other questions or issues
 - Mitigation
 - Self-issuance of permits
 - Consistency with permit requirements
 - Enforcement and Compliance
- Next Steps

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Why Are We Here?

- Provide information on Clean Water Act Section 404 Program (CWA §404(g))
 - What is assumption?
- EPA is supporting tribes and states that wish to assume CWA §404(g) permit program
 - Acting Administrator Wheeler letter – September 20, 2018
- EPA is updating the CWA §404(g) regulations
 - Seeking input on how regulations could be updated and modernized to increase interest in CWA §404(g)
 - Fall Regulatory Agenda – Propose Rule 2020

What Is CWA §404(g) Program Assumption?

- **CWA §404 requires a permit be issued before dredged or fill material can be discharged into waters of the US**
- CWA § 404(g) enables tribes and states to assume administration of the program for certain waters
 - Michigan (1984) & New Jersey (1994) have assumed this authority
 - Army Corps of Engineers (Corps) issues permits for all other jurisdictional waters
 - EPA oversees assumed programs

What are the Authorities For State/Tribal CWA §404(g) Programs ?

- CWA §404(g) and 40 CFR Part 233 describe:
 - State and tribal program requirements
 - EPA responsibilities: approval and oversight of assumed program
 - Requirements for review, modification, and (if necessary) withdrawal of assumed program
- State/tribal programs are not delegated, they operate under state/tribal statutes.
 - A tribal or state assumed program must be consistent with and no less stringent than the CWA and regulations.

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Why Assume the CWA § 404 Program?

States and tribes have said:

- Streamline permitting – reduce permitting timeframes and facilitate coordination with other tribal and state water and land use programs
- Eliminate unnecessary duplication
- We have more intimate knowledge of our water resources and needs
- Be consistent with other CWA programs implemented by tribes and states

What challenges have states and tribes identified?

- Lack of dedicated funding
- Lack of clarity on assumption process and requirements including which waters are assumable

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What Are the Assumption Requirements?

Assumed program must include, but is not limited to:

- Permitting procedures;
- Administrative and judicial review procedures;
- Regulation of discharges into all assumed waters within the tribe or state's jurisdiction;
- Regulation of at least the same scope of activities as the CWA § 404 program;
- Provisions for public participation;
- Meeting public notice requirements;
- Permit issuance consistent with the environmental review criteria known as the CWA §404 (b)(1) Guidelines;
- Compliance and enforcement authorities as specified in the regulations; and
- Coordination procedures with federal agencies, adjacent states and tribes.

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What Is EPA's Role in Assumption?

Prior to assumption:

- Work with tribes and states to enhance capacity/capability and develop programs
- Wetland Program Development Grants can fund capacity building
- CWA §106 can fund program implementation

Evaluate and approve/disapprove assumption request:

- Includes tribal consultation if appropriate

Oversight of assumed program:

- Review and comment on permits (if not waived)
- Review modifications to assumed program
- Withdraw program approval (if necessary)

Roles of Tribes/States Under Assumed Programs

- Issue permits
 - Process permit consistent with state/tribal approved program
 - Tribe/state transmits to EPA notice of every permit application received
 - Address comments from downstream states and tribes
 - Address any EPA conditions and/or comments on permits reviewed
 - State or tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- Conduct enforcement (if authorized)

EPA Is Revising CWA §404(g) Regulations

- First comprehensive revision to the existing CWA §404(g) regulations since 1988
- EPA is seeking early input from our co-regulators on potential changes
- Pre-Proposal engagement:
 - Tribal consultation and coordination
 - Comment period October 22 - December 21, 2018
 - Presentation to National Congress of American Indians - October 24, 2018, Denver, CO
 - Tribal webinars held on November 20 and 29, 2018
 - State input
 - Comment period November 12, 2018 – January 11, 2019
 - Meeting December 5, 2018, Washington, DC

Issues for Input

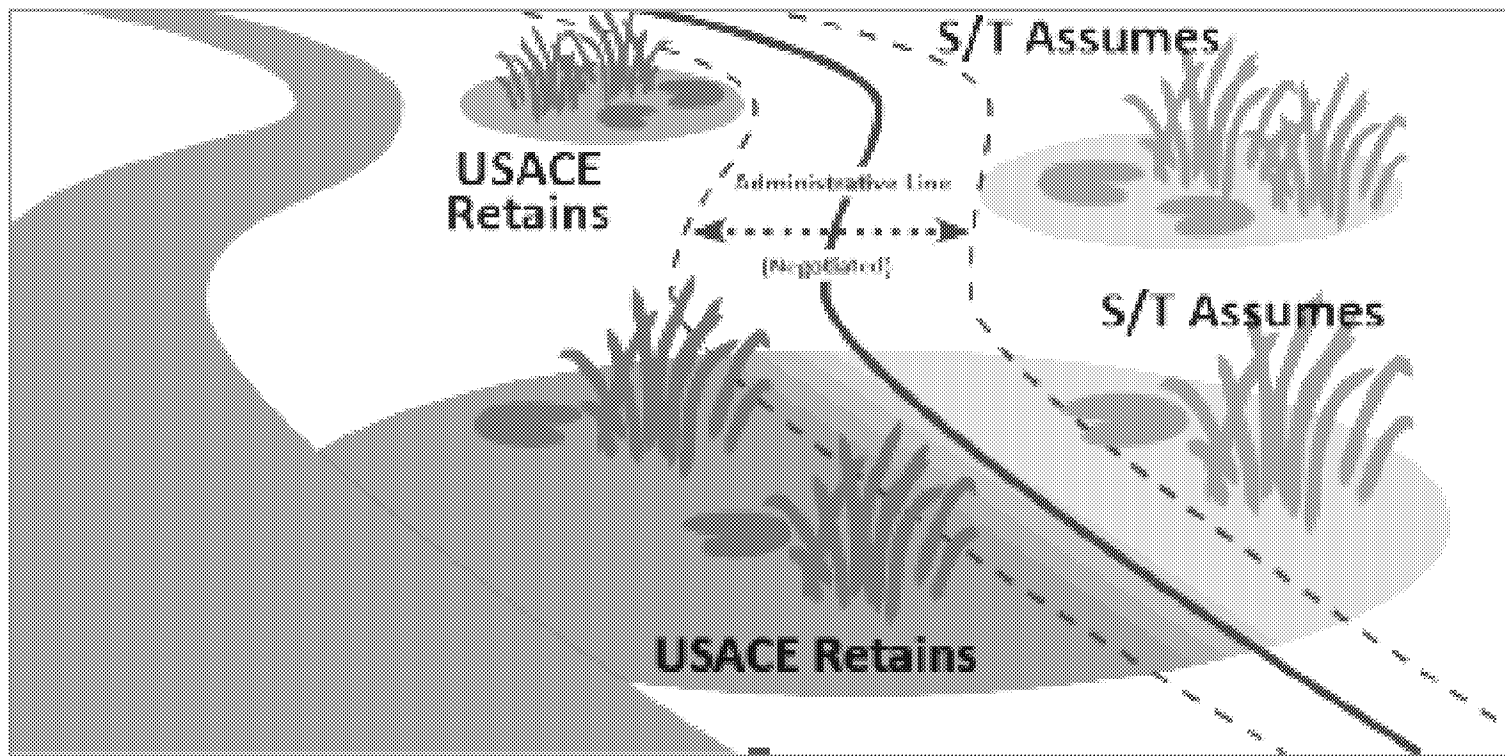
- Clarifying Scope of Assumable Waters
- Partial Assumption
- Calculating Economic Costs and Benefits of the Rule
- Other Potential Issues

Issue #1: Clarifying Scope of Assumable Waters

Background:

- States and tribes can assume administration of the CWA §404 program only in certain waters. The Corps retains permitting authority for:
 - Tidal waters and their adjacent wetlands
 - Waters used as a means to transport interstate or foreign commerce and their adjacent wetlands
- Retained waters further clarified in recent US Army memo:
 - August 7, 2018, memo describes which waters are to be retained by Corps when state or tribe assumes waters
 - Based upon 2017 recommendations from EPA federal advisory committee on assumable waters (<https://www.epa.gov/cwa-404/assumable-waters-sub-committee>)

Retained vs Assumed Adjacent Wetlands Graphic: of FACA Recommendation 3C



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Issue #1: Clarifying Scope of Assumable Waters

Questions:

- The scope of assumable and retained waters:
 - Should the EPA codify the Subcommittee majority's recommendation that the Corps retained waters be based on § 10 waters of the Rivers and Harbors Act?
 - If yes, how should post-assumption changes to the Corps' § 10 list be treated? What process should be used to make any potential changes to the retained waters list?
- Which adjacent wetlands should be retained:
 - Should the EPA codify the Subcommittee majority's "default" 300 foot administrative line - Corps retains wetlands waterward of the line. If so, why?
 - Should a different "default" value be considered? If so, why?
 - Should there be no default distance in light of differing wetlands characteristics among different eco-regions? If so, why?
- Who (tribe/state or Corps) should have administrative permitting authority over discharges that extend across the administrative line?

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Issue #2: Partial Assumption

Background: States and tribes have requested the ability to assume part of the program, which is currently not an option.

Questions:

- Would partial assumption be of interest to your tribe?
 - Would your tribe be more likely to assume 404 authority?
 - What are the benefits to partial assumption?
 - What are the challenges to partial assumption?
 - Should the approach allow more than one state/tribal entity to take on different portions of the 404 program? In a phased approach?
- How would you suggest partial assumption be structured?
 - By activity? By discharge impact threshold? By geographic distribution?
 - How will a permittee know to whom they should submit a permit application?
- How is this different than a State Programmatic General Permit (SPGP)?
 - If you have experience with an SPGP, and are considering partial assumption, what additional flexibility would partial assumption provide that an SPGP does not?

Issue #3: Calculating Economic Costs and Benefits of the Rule

Background: EPA will conduct an economic analysis as part of the rulemaking

Questions:

- What are the anticipated costs and benefits to states/tribes and federal agencies (e.g., staffing, administrative costs)?
 - Cost and benefits of full and partial assumption.
- Are there other limitations and barriers (e.g., interagency coordination, expertise)?
- Are there elements of program assumption that EPA could clarify are eligible for support under existing authorities?

#4 Other Potential Issues

Self-issuance of permits:

- What practices should be followed when it becomes necessary for the tribe or state to issue a permit to itself?

Mitigation:

- Should establishment and composition of mitigation interagency review teams (IRTs) differ under assumed programs? If so, how?
- How might existing mitigation banks containing assumed waters continue operation following assumption?

Consistency with permit requirements

- How can states and tribes best ensure permits comply with the (b)(1) guidelines?
- How can tribes and states address threatened and endangered species or national historic sites?

Enforcement and Compliance

- Do the current regulations impose any barriers to assumption that EPA could consider addressing?
- Should EPA consider changes that would help in abating violations of permits or the permit program?

Questions?

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Next Steps on CWA §404(g) Regulation Revision

- **Tribes can submit pre-proposal comments:**
 - Comments can be submitted by **December 21, 2018** to: 404g-rulemaking@epa.gov
- **EPA will review input and craft proposed regulatory language**
 - Will engage other agencies during OMB review
 - Will likely host another webinar prior to publishing proposal
- **How to submit public comments:**
 - EPA will open a public comment period when the Agency publishes the proposed rule in the Federal Register in 2020

Additional Information

EPA 404 assumption website:
<https://www.epa.gov/cwa404g>

Email and pre-rule consultation
comments:
404g-rulemaking@epa.gov

Contact Information

404(g) Tribal Consultation

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Thank you

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